Volume 18 | Issue 2 Article 2

2007

Opening the Floodgates: The Roberts Court's Decision in Rapanos v. United States Spells Trouble for the Future of the Waters of the United States

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2007]

OPENING THE FLOODGATES: THE ROBERTS COURT'S DECISION IN *RAPANOS v. UNITED STATES* SPELLS TROUBLE FOR THE FUTURE OF THE WATERS OF THE UNITED STATES

I. INTRODUCTION

The 1960s saw a marked increase in America's awareness of the environment's increasingly dilapidated state.[1] Since the dawn of the industrial revolution, the environment has been subject to man's neglect, and during the 1960s the effects of this neglect could no longer evade the nation's attention.[2] The dire state of America's bodies of water was of particular concern: at that time, the Potomac River was too polluted for people to safely swim in, Lake Erie was practically "dead" and the Cuyahoga River actually burst into flames after a lit match was thrown into its contaminated waters.[3] The Clean Water Act (CWA or Act), enacted by Congress in 1972, represents the response of our nation's elected officials to the alarming degradation of the nation's waters.[4] Congress drafted the CWA with the intent of accomplishing a Herculean goal — restoring the "integrity" of our nation's waters.[5] In effectuating this purpose, Congress granted the Army Corps of Engineers (Corps) the responsibility of enforcing much of the regulation of this ambitious Act.[6]

1. *See* William D. Ruckelshaus, *Environmental Protection: A Brief History of the Environmental Movement in America and the Implications Abroad*, 15 ENVTL. L. 455, 455 (1985) (describing rise of environmental awareness in the 1960s). Ruckelshaus explained that, while environmental concerns had always existed in America, it was not until the 1960s that these issues became a major national concern. *See id.*

2. *See id.* at 455-56 (discussing cause of environmental awareness during 1960s).

3. *See id.* at 457-58 (discussing fire on Cuyahoga River and ensuing damage). *See also* Press Release, Environmental Protection Agency, Clean Water Action Plan (Feb. 19, 1998), *available at* http://www.epa.gov/history/topics/cwa/03.htm (describing major environmental concerns that occurred prior to enactment of CWA).

4. *See* Eric Pianin, *EPA to Allow Polluters to Buy Clean Water Credits: Environmental Groups Say Policy Weakens Law*, WASH. POST, Jan. 14, 2003, at A03 (discussing purpose of CWA).

5. *See* Kimberly Breedon, Comment, *The Reach of Raich: Implications for Legislative Amendments and Judicial Interpretations of the Clean Water Act*, 74 U. CIN. L. REV. 1441, 1444-45 (2006) (explaining purpose of CWA).

6. *See id.* at 1445 (explaining authority EPA and Congress granted to Corps). *See also* Jon Schutz, *The Steepest Hurdle in Obtaining a Clean Water Act Section 404 Permit: Complying with EPA's 404(B)(1) Guidelines' Least Environmentally Damaging Practicable Alternative Requirement*, 24 UCLA J. ENVTL. L. & POL'Y 235, 236 (2006)

Although many argue that the CWA performed admirably in accomplishing such lofty expectations,[7] others take issue with the means the Corps employs when enforcing the statute.[8] Until recently, the Corps possessed broad authority to enforce the CWA, having the discretion to determine when and where to impose limitations on citizens' proposed uses of the nation's waterways.[9]

The Supreme Court's recent decision in *Rapanos v. United States* (*Rapanos*)[10] put an abrupt end to the Corps's ability to impose environmental regulations on the nation's waters based on their interpretation of the CWA.[11] In *Rapanos*, the Supreme Court issued a plurality decision that precludes the Corps's authority to impose CWA restrictions on the use of wetlands that feed into our nation's waters based solely on its own ecological conclusions.[12] The decision stands as a significant setback for the further success of the CWA and threatens to have a harmful effect on the nation's water quality.[13] Moreover, because *Rapanos* represents the first major environmental issue considered by the "Roberts" Court, the result reached is even more unsettling because newly-appointed Justices Alito and Roberts aligned themselves with the opinion of Justice Scalia, which called for dramatic restrictions on decades old environmental legislation.[14]

(explaining Corps's authority to grant permits discharging dredged material pursuant to CWA section 404).

7. *See* Donna Frye, *The Clean Water Act: Thirty Years Later*, SAN DIEGO EARTH TIMES, Nov. 2002, *available at* http://www.sdearthtimes.com/et1102/et1102s6.html) (discussing success of CWA).

8. *See generally*, Rapanos v. United States, 126 S. Ct. 2208, 2220-21 (2006) (asserting Corps's enforcement of CWA as impermissible); *see also id.* at 2235-36 (Roberts, C.J., concurring) (asserting Corps's enforcement of CWA as impermissible).

9. *See id.* (explaining breadth of Corps's authority in granting section 404 permits).

10. 126 S. Ct. 2208 (2006).

11. *See* Schutz, *supra* note 6, at 236 (explaining Corps's authority under section 404).

12. *See generally Rapanos*, 126 S. Ct. 2208 (explaining holding).

13. *See* Charlie Tebbutt, *Ruling Befouls Clean Water Efforts; A New Voting Bloc on the U.S. Supreme Court is Endangering 34 Years of Protections for Our Nation's Streams and Wetlands*, THE REGISTER-GUARD (Eugene, OR), Aug. 20, 2006, at F1 (describing current makeup of Supreme Court and implications of *Rapanos* decision).

14. *See* David G. Savage, *The New Term; How Much of an Umpire is the Chief Justice?*, L.A. TIMES, Sept. 24, 2006, at M3 (describing current makeup of Supreme Court and implications of *Rapanos* decision).

> For more than three decades, these [CWA] federal regulations on wetlands and streams had stood, through Republican and Democratic administrations and through GOP- and Democratic-controlled Congresses. Yet, with one extra vote, the Roberts court would have rewritten the scope of the Clean Water Act in its first term — not the act of a modest Supreme Court.

This Note examines the Supreme Court's decision in *Rapanos v. United States*.[15] Section II states the facts that gave rise to the Supreme Court's decision.[16] Section III discusses the background of the CWA and the Supreme Court's two prior decisions regarding the scope of the Corps's jurisdiction under the CWA.[17] Section IV presents the three distinct opinions offered by the Supreme Court in *Rapanos*.[18] Section V evaluates the opinions offered by Justices Scalia and Kennedy.[19] Section VI assesses the potential impact of the Supreme Court's holding.[20]

II. FACTS

The Supreme Court's decision in *Rapanos v. United States* involved two separate civil actions.[21] In Case No. 04-1034, the United States brought civil enforcement proceedings against defendant John Rapanos.[22] In Case No. 04-1384, Keith and June Carabell sued the government after the Corps refused to issue them a permit to deposit fill into a wetland.[23] The cases were consolidated for the purpose of addressing the issue of what constitutes a "wetland" under the CWA.[24]

John Rapanos possessed three large plots of land in Michigan, which he intended to use for commercial development, and he asked that the Michigan Department of Natural Resources (MDNR) inspect one of the properties.[25] After viewing the property, an MDNR inspector informed Rapanos that it likely contained areas that may be classified as "waters of the United States" under section 404 of the CWA and sent him an application for a section

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Id. See also, Tebbutt, *supra* note 13, at F1 (explaining implications of Court's decision in *Rapanos*).

15. For a discussion of the propriety of the result reached by the Supreme Court in *Rapanos*, see *infra* notes 118-64 and accompanying text.

16. For a discussion of the facts, see *infra* notes 21-40 and accompanying text.

17. For a discussion of the origin of the CWA and the case law addressing the act, see *infra* notes 41-73 and accompanying text.

18. For a discussion of the opinions authored by Justices Scalia, Kennedy and Stevens in *Rapanos*, see *infra* notes 74-117 and accompanying text.

19. For a critical analysis of the plurality opinion in *Rapanos*, see *infra* notes 118-64 and accompanying text.

20. For a discussion of the potential impact of the Supreme Court's decision in *Rapanos*, see *infra* notes 165-91 and accompanying text.

21. *See Rapanos*, 126 S. Ct. 2208, 2211 (2006) (explaining procedural background of Supreme Court's decision).

22. *See id.* (explaining procedural background of decision).

23. *See id.* at 2219 (describing facts of Carabell's case).

24. *See id.* at 2220 (explaining procedural background of decision).

25. *See id.* at 2253 (Stevens, J., dissenting) (discussing facts of case).

404 permit.[26] Upon receiving the application, Rapanos hired a wetland consultant to advise him of the likelihood that the permit would be granted.[27] After hearing that his property contained large areas of wetlands, Rapanos threatened to "'destroy' [his wetland consultant] if he did not destroy the wetland report and refused to pay" for the consultant's services unless the consultant complied with his demand.[28]

Rapanos began developing all three properties without applying for the required permits, hiring a construction company to clear the land, fill in low areas of the land and drain subsurface water.[29] Rapanos prevented the MDNR from visiting his property and later ignored both a cease-and-desist letter issued by the MDNR and an Environmental Protection Agency (EPA) administrative compliance order.[30] The federal government brought a civil action against Rapanos, charging him with acting in violation of the CWA.[31] The district court upheld the Corps's jurisdiction and found the petitioner had violated the CWA on all three of his plots of land, and the Sixth Circuit affirmed the decision.[32]

The Carabells' case against the government was much more straightforward.[33] The Carabells owned twenty acres in Macomb County, Michigan, sixteen of which were deemed wetlands.[34] The wetlands in question bordered a ditch "that flow[ed] into a drain that flow[ed] into a creek that flow[ed] into" a lake.[35] These wetlands were separated from the ditch by a manmade berm.[36]

The Carabells intended to use the land as the site of a condominium complex.[37] After inspecting the site, the Water Quality Unit of Macomb County lobbied the Corps to deny the Carabells their permit, finding that construction on the wetlands "would have an unacceptable adverse effect on wildlife, water quality and conser-

26. *See Rapanos*, 126 S. Ct. at 2253 (Stevens, J., dissenting) (discussing facts of case).

27. *See id.* (Stevens, J., dissenting) (discussing facts of case).

28. *See id.* (Stevens, J., dissenting) (discussing facts of case).

29. *See id.* (Stevens, J., dissenting) (discussing facts of case).

30. *See id.* (Stevens, J., dissenting) (discussing facts of case).

31. *See Rapanos*, 126 S. Ct. at 2239 (Kennedy, J., concurring) (discussing facts of case).

32. *See id.* (Kennedy, J., concurring) (discussing procedural history).

33. *See id.* at 2254 (Stevens, J., dissenting) (discussing facts of case).

34. *See id.* (Stevens, J., dissenting) (discussing facts of case).

35. *See id.* (Stevens, J., dissenting) (discussing facts of case).

36. *See Rapanos*, 126 S. Ct. at 2253 (Stevens, J., dissenting) (discussing facts of case).

37. *See id.* at 2254 (Stevens, J., dissenting) (describing facts of case).

vation of wetlands resources."[38] The Corps denied the Carabells a permit, and the Carabells sought judicial review of the decision.[39] The district court granted the Corps summary judgment, and the Sixth Circuit affirmed on appeal.[40]

III. BACKGROUND

A. History of the CWA

In 1972, Congress enacted the CWA with the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of [the] Nation's waters."[41] The Act was ambitious, aiming to eliminate the discharge of pollutants into national waterways by 1985.[42] Congress ceded the power to enforce the CWA jointly to the EPA and the Corps.[43]

The EPA possesses broad authority in the administration of the CWA, as it is charged with the duty to promulgate regulations punishable by both civil and criminal penalties under the Act.[44] The Corps's authority under the Act is limited to administering the issuance of permits under CWA section 404.[45] Section 404 regulates the discharge of pollutants into the nation's waters, and it is the Corps's duty to ensure that permit-seekers are in compliance with the EPA's substantive water-quality protection regulations.[46]

The scope of the CWA does not cover merely America's major bodies of water; rather, the Act aims to protect "*all* waters of the 'United States.'"[47] Although the Act does not clearly define what

38. *See id.* (Stevens, J., dissenting) (describing facts of case).

39. *See id.* at 2240 (Kennedy, J., concurring) (describing facts of case).

40. *See id.* (Kennedy, J., concurring) (describing procedural background of case).

41. *See* Clean Water Act, 33 U.S.C. § 1251(a) (2006) (stating purpose of CWA). The CWA is codified at 33 U.S.C. §§ 1251-1387 (2006).

42. *See id.* § 1251(a)(1) (describing goals of CWA).

43. *See* Breedon, *supra* note 5, at 1444-45 (discussing Congress's grant of administrative authority to Corps and EPA).

44. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rule with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 584 (2002) (describing authority vested in CWA).

45. *See* Breedon, *supra* note 5, at 1445 (discussing Corps's role in administering CWA).

46. *See id.* (discussing Corps's role in administering CWA).

47. *See id.* (emphasis added) (discussing scope of CWA). *See also* CWA, 33 U.S.C. § 1362(6) (2000) (defining term "waters" under CWA). The CWA defines "waters" as "navigable waters" and "navigable waters" as "the waters of the United States, including the territorial seas." *See id.*

constitutes the "waters of the United States," both the EPA and the Corps have acted to sculpt the definition through regulation.[48]

Of all the bodies of water regulated under the CWA, those deemed "wetlands" are perhaps the most controversial.[49] The EPA defines wetlands as:

> [T]hose areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.[50]

The inclusion of the nation's wetlands in the CWA was not merely incidental; these bodies of water were included specifically because they are crucial to the preservation of the quality of the nation's waters.[51] The various habitats that comprise the nation's wetlands are the "primary pollution control systems of the nation's waters."[52] Wetlands serve critical functions for the nation's environment — they remove "heavy metals" and pollutants from the water and purify groundwater — thereby "providing municipal drinking water supplies for towns and cities across the country."[53] Eradication of the nation's wetlands results in adverse consequences for both the environment and the nation as a whole, threatening to deplete the natural environment of many species, while hampering commercial and recreational activities enjoyed by the American public.[54]

B. Case Law

In 1985, the Supreme Court for the first time addressed the Corps's regulatory authority to define the "the waters of the United States" in *United States v. Riverside Bayview Homes* (*Riverside Bayview*).[55] In that case, the defendant, Riverside Bayview, at-

48. *See* 33 C.F.R. pt. 328.3(a) (2002) (Corps); 40 C.F.R. pt. 230.3(s) (2002) (EPA) (providing definitions of "waters of the United States").

49. *See* Oliver A. Houck & Michael Rolland, *Environmental Federalism: Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1243 (1995) (stating that federal wetlands regulation may be most controversial issue in environmental law).

50. *See* 40 C.F.R. pt. 230.3(s) (2002) (providing EPA definition of wetlands).

51. *See* Houck & Rolland, *supra* note 49, at 1244-45 (discussing reason for inclusion of wetlands within protection of CWA).

52. *See id.* (discussing pollution control function of wetlands).

53. *See id.* (discussing pollution control function of wetlands).

54. *See id.* (discussing adverse effects caused by destruction of wetlands).

55. *See* United States v. Riverside Bayview Homes, 474 U.S. 121, 123 (1985) (stating issue presented).

tempted to place fill material into low-level marshland that it possessed.[56] The Corps brought an action in the Eastern District Court of Michigan to enjoin the defendants from continuing their filling activities.[57] The Corps argued that the property properly fell within the definition of "waters of the United States" under the CWA because it was an "adjacent wetland," which, if misused, could adversely affect interstate commerce.[58] The Eastern District Court of Michigan held in favor of the Corps, but the Sixth Circuit reversed, finding the term "adjacent waters" to apply only to those adjacent waters that were subject to flooding by navigable waters at a frequency sufficient to allow the wetlands to support aquatic vegetation.[59]

In a unanimous decision, the Supreme Court reversed the decision of the Sixth Circuit.[60] The Court, relying heavily on its prior decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (*Chevron*),[61] rejected the Sixth Circuit's narrow interpretation of the term "wetlands," finding instead that where an agency, such as the Corps, construes a charging statute to have a certain meaning, that meaning "is entitled deference if it is reasonable and not in conflict with the expressed intent of Congress."[62] With respect to the CWA, the Court concluded that it was Congress's intent to create a broad definition of the term "waters."[63] Furthermore, because the goal of the CWA was to protect the waters of the United States and because the Corps determined that the pollution of wetlands such as those in dispute could have an adverse effect on such waters, the Court found that the Corps had reasonably construed the term "wetlands" that lay adjacent to waters of the United States as fitting within the CWA's definition of "waters."[64]

The Supreme Court next addressed the Corps's regulatory jurisdiction in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*).[65] In that case, the Court considered

56. *See id.* at 124 (discussing facts of case).

57. *See id.* (discussing facts of case).

58. *See id.* (discussing facts of case).

59. *See id.* (discussing facts of case).

60. *See generally Riverside Bayview*, 474 U.S. at 124 (describing holding of case).

61. 467 U.S. 837 (1984).

62. *See Riverside Bayview*, 474 U.S. at 131 (explaining rationale of Court's holding).

63. *See id.* at 133 (explaining congressional intent in defining term "waters" for purposes of CWA).

64. *See id.* at 134-35 (explaining Corps's authority to define term "waters" under CWA).

65. 531 U.S. 159 (2001) [hereinafter *SWANCC*].

whether the Corps properly interpreted CWA section 404 as granting it the authority to regulate land that provided a habitat for migratory birds.[66] More specifically, the Court was required to determine the validity of the Corps's authority to impose restrictions on wetland activities based on the "Migratory Bird Rule," a rule the Corps created in 1986 for the purpose of asserting jurisdiction over isolated waters on the basis that migratory birds were "dependent" on these waters.[67]

The Solid Waste Agency of Northern Cook County (Solid Waste Agency) proposed to dispose of solid waste on an abandoned 533-acre plot of land.[68] Part of the proposed land consisted of both permanent and non-permanent ponds.[69] After realizing that several species of migratory birds inhabited the area, the Corps refused to issue the agency a 404 permit on the grounds that the petitioner's actions were in violation of the "Migratory Bird Rule."[70] The Solid Waste Agency sued the government, arguing that the Corps did not have jurisdiction over the land-locked ponds.[71]

The Supreme Court agreed with the petitioners and refused to give credence to the Corps's belief that they possessed the authority to extend the term "navigable waters" to the isolated ponds at issue in the case.[72] The Court reasoned that permitting the EPA and the Corps "to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."[73]

IV. NARRATIVE ANALYSIS

The outcome of the Supreme Court's *Rapanos* decision is complicated given that no single opinion captured a majority vote.[74]

66. *See id.* at 162 (describing issue of case).

67. *See Rapanos v. United States*, 126 S. Ct. 2208, 2256 (2006) (Stevens, J., dissenting) (discussing issue in *SWANCC*).

68. *See SWANCC*, 531 U.S. at 163 (describing facts of case).

69. *See id.* at 164 (describing facts of case).

70. *See id.* (describing facts of case). The Migratory Bird Rule was created by the Corps and proposes to include those lands used by migratory birds as wetlands for purposes of the CWA. *See* 33 C.F.R. pt. 328.3(a)(3) (1999) (setting forth Migratory Bird Rule).

71. *See SWANCC*, 531 U.S. at 165 (discussing procedural history of *SWANCC*).

72. *See id.* at 174 (holding application of Migratory Bird Rule exceeded authority of Corps).

73. *See id.* (citing Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994)) (discussing rationale for Court's decision).

74. *See generally Rapanos v. United States*, 126 S. Ct. 2208 (2006) (explaining multiple opinions of case).

Instead, the Court's decision is divided into three distinct opinions: (1) the plurality opinion of Justice Scalia, joined by three justices, who voted to vacate and remand the decision of the Sixth Circuit and impose significant limitations on the Corps's jurisdiction;[75] (2) the concurring opinion of Justice Kennedy, who wrote separately to remand the Sixth Circuit's decision, but would impose lesser restrictions on the jurisdiction of the Corps[76] and (3) the dissent of Justice Stevens, joined by three justices, who would affirm the decision of the Sixth Circuit, leaving the Corps's jurisdiction over the wetlands fully intact.[77]

A. Justice Scalia's Opinion

The opinion of Justice Scalia, joined by Justices Thomas, Roberts and Alito, would impose significant limitations on the Corps's jurisdiction over the nation's waters by drastically altering the permissible definition of "wetland" for purposes of the CWA.[78] Justice Scalia began his analysis by focusing on the limitations imposed on the Corps's jurisdiction, which was established in the Court's *SWANCC* decision.[79] Justice Scalia observed that the Court's holding in *SWANCC* determined that *Riverside Bayview* did not establish the Corps's jurisdiction over bodies of water that were not adjacent to open water.[80]

In light of this opinion and its limitations, Justice Scalia believed the Corps failed to take measures that reflected the Court's holding in *SWANCC* when promulgating its regulations, and, as a result, lower courts were still in the practice of granting jurisdiction over bodies of water that were expressly barred from federal jurisdiction under the *SWANCC* decision.[81] Specifically, Justice Scalia pointed to lower court decisions granting the Corps jurisdiction

75. *See id.* at 2235 (ordering case remanded to Sixth Circuit and calling for Court to reconsider case under new test of Corps's jurisdiction).

76. *See id.* at 2252 (Kennedy, J., concurring) (ordering case remanded to Sixth Circuit and calling for Court to reconsider case under "significant nexus" test).

77. *See id.* at 2265 (Stevens, J., dissenting) (voting to affirm holding of Sixth Circuit).

78. *See generally* Wayne Whitlock & Norman Carlin, *United States: The Long-Awaited* Rapanos *Decision Narrows Clean Water Act Jurisdiction Over Wetland and Tributaries, But Leaves Important Questions Unresolved,* MONDAQ BUSINESS BRIEFING, Aug. 2, 2006 (explaining limitations imposed by Scalia opinion).

79. *See Rapanos,* 126 S. Ct. at 2216-17 (plurality opinion) (discussing holdings in *Riverside Bayview* and *SWANCC*).

80. *See id.* (explaining decision in *SWANCC*).

81. *See id.* at 2217 (discussing Corps's failure to amend regulations following Supreme Court decision in *SWANCC*).

over "'a roadside ditch' whose water took 'a winding, thirty-two-mile path to the Chesapeake Bay,' irrigation ditches and drains that intermittently connect to covered waters, and (most implausibly of all) the 'washes and arroyos' of an 'arid development site,' located in the middle of the desert . . . ."[82] In Justice Scalia's view, the Corps's jurisdiction over bodies of water such as these far exceeded the authority the agency could reasonably exercise under the CWA.[83]

Justice Scalia argued that the Corps's jurisdiction must be realigned to reflect a more reasonable interpretation of the term "waters of the United States" under the CWA.[84] Justice Scalia took a literal view of the CWA's use of the word "waters" as opposed to "water:" "[t]he use of the definite article ('the') and the plural number ('waters') show plainly that [section] 1362(7) does not refer to water in general."[85] Having concluded that the CWA does not aim to protect all of America's waters in general through his analysis of the word "waters," Justice Scalia then attempted to discern what waters *are* protected by the CWA.[86] To resolve his quandary, Justice Scalia consulted Webster's Dictionary for guidance: "[t]he definition refers to 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'"[87] This definition would exclude "channels containing merely intermittent or ephemeral flow."[88] Accordingly, Justice Scalia found that the Corps's application of the CWA to "'ephemeral streams,' 'wet meadows,' storm sewers and culverts, 'directional sheet flow during

82. *See id.* at 2218 (quoting United States v. Deaton, 332 F.3d 698, 702 (4th Cir. 2003); Community Assn. for Restoration of Env't v. Henry Bosma Dairy, 305 F.3d 943, 954-55 (9th Cir. 2002); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d. 526, 534 (9th Cir. 2001)) (describing holdings of United States Courts of Appeals granting broad jurisdiction to Corps).

83. *See id.* at 2224 (explaining Corps's interpretation of its jurisdiction under CWA as impermissible).

84. *See Rapanos*, 126 S. Ct. at 2220 (discussing need for Court to determine reasonable interpretation of "navigable waters" under CWA). Justice Scalia stated that "[t]he only natural definition of the term 'waters,' our prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and this Court's canons of construction all confirm that 'the waters of the United States' in [section] 1362(7) cannot bear the expansive meaning the Corps would give it." *Id.*

85. *See id.* (discussing Justice Scalia's determination of meaning of "waters" under CWA).

86. *See id.* at 2220-21 (discussing proper interpretation of "waters" under CWA).

87. *See id.* at 2221 (discussing Justice Scalia's formulation of term "waters" under CWA).

88. *See id.* at 2222 (discussing Justice Scalia's formulation of term "waters" under CWA).

storm events,' drain tiles, manmade drainage ditches, and dry arroyos . . . stretched the term 'waters of the United States' beyond parody."[89] Justice Scalia asserted that such an expansive interpretation defied the policy considerations of Congress and brought "virtually all 'plan[ning of] the development and use . . . of land and water resources' by States under federal control."[90]

To abrogate the Corps's apparent abuse of authority, Justice Scalia would rein in its ability to exercise its professional discretion when determining which waters should be off-limits to commercial development.[91] Justice Scalia argued that the Corps is powerless to determine which waters may be considered "adjacent" to waters of the United States for purposes of the CWA.[92] Although Justice Scalia admitted that *Riverside Bayview* held that the Court should defer to the Corps's determinations of what constitutes a wetland where the nation's waters abutted land masses,[93] Justice Scalia also posited that the Court's holding in *SWANCC* limited such determinations to only those wetlands that possess "a continuous surface connection to bodies that are 'waters of the United States.'"[94] Based on this holding, Justice Scalia concluded that the Corps's jurisdiction is limited by an objective, two-part, bright line test limiting its authority to deny permits to fill wetlands only to circumstances where: (1) the adjacent channel in question "contains a water of the United States" and (2) "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[95]

In light of his findings, Justice Scalia concluded that the Sixth Circuit applied an overly broad test when determining whether the properties in dispute fell within the jurisdiction of the Corps.[96] Because Justice Scalia found the Sixth Circuit had not applied a test that would determine whether the properties possessed a continuous surface connection to the "waters of the United States," he or-

89. *See Rapanos*, 126 S. Ct. at 2222 (discussing Justice Scalia's disapproval of Corps's application of CWA).

90. *See id.* at 2223-24 (discussing adverse effects caused by Corps's application of CWA).

91. *See generally id.* at 2226 (discussing limited nature of Corps's authority).

92. *See id.* (discussing limited nature of Corps's authority).

93. *See id.* (discussing Court's holding in *Riverside Bayview*).

94. *See Rapanos*, 126 S. Ct. at 2226 (discussing Justice Scalia's method of determining proper application of CWA).

95. *See id.* at 2227 (discussing Justice Scalia's method of determining proper application of CWA).

96. *See id.* at 2235 (discussing Sixth Circuit's determination of applicable test in dispute).

dered the judgment vacated and asked the court to reconsider the case under his interpretation of the breadth of the CWA.[97]

B. Justice Kennedy's Concurrence

In his concurring opinion, Justice Kennedy offered a more moderate assessment of the Corps's jurisdiction under the CWA, and although he would impose certain restrictions on the Corps's authority, the restrictions he recommended were far less drastic than the measures proposed by Justice Scalia.[98] According to Justice Kennedy, the issue at stake was whether "the Corps' regulations, as applied to the wetlands [in dispute], constitute a reasonable interpretation of 'navigable waters' as in *Riverside Bayview* or an invalid construction as in *SWANCC*[.]"[99] Specifically, Justice Kennedy found:

> Taken together these cases establish that in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking.[100]

To Justice Kennedy then, the key to determining the Corps's jurisdiction over a given wetland lay in whether such wetland possessed a "significant nexus" to a navigable waterway.[101] According to Justice Kennedy, such a nexus could be determined to exist where such wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'" and would exclude those whose effects on the quality of navigable waters "are only speculative or insubstantial."[102] Justice Kennedy's test thus eschewed the stringent requirements of Justice Scalia's test, allowing the Corps to possess more

97. *See id.* (remanding case to Sixth Circuit).

98. *See id.* at 2241 (Kennedy, J., concurring) (discussing issue of case).

99. *See Rapanos*, 126 S. Ct. at 2241 (Kennedy, J., concurring) (formulating framework for Court's inquiries).

100. *See id.* (Kennedy, J., concurring) (quoting effect of cases).

101. *See id.* (Kennedy J, concurring) (discussing necessity of wetlands containing significant nexus to navigable waters).

102. *See id.* at 2248 (Kennedy, J., concurring) (stating how to establish "significant nexus").

flexibility in determining which wetlands may be considered protected under the CWA.[103] Yet, while Justice Kennedy's "significant nexus" test was significantly broader in determining what constituted a wetland, it nevertheless imposed new limitations on the Corps's jurisdiction by disallowing the Corps to regulate any body of water that possessed a hydrological connection to navigable waters.[104]

C. The Dissent

Justice Stevens's dissent was highly critical of both Justice Scalia's plurality opinion and Justice Kennedy's concurrence.[105] To Justice Stevens, the Corps's jurisdiction over the waters in question was not even a close call; instead, Justice Stevens viewed its authority to regulate the wetlands as "straightforward."[106]

Justice Stevens found the issue of whether the Corps had jurisdiction over the wetlands in question to fit squarely within the Court's prior decision in *Riverside Bayview*.[107] According to Justice Stevens, the issue at hand in *Riverside Bayview* was whether the CWA "'authorize[d] the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable waters *and their tributaries*.'"[108] Justice Stevens interpreted the *Riverside Bayview* decision as holding that the Corps possessed the authority to determine when and where a wetland may be deemed to have an important effect on the ecosystem and to grant permits based on its findings.[109] Justice Stevens further argued that Justice Scalia's assertion that the Corps's jurisdiction was overbroad was erroneous because the Corps also possessed the discretion to *allow* individuals to fill wetlands when they determined

103. *See id.* at 2250 (Kennedy, J., concurring) (discussing possibility that significant nexus may exist in cases in dispute).

104. *See Rapanos*, 126 S. Ct. at 2251 (Kennedy, J., concurring) (discussing prior Corps practice of entertaining jurisdiction where any hydrological connection to navigable waters existed).

105. *See generally id.* at 2252-66 (Stevens, J., dissenting) (explaining faults in plurality justification for ordering decision of Sixth Circuit be remanded).

106. *See id.* at 2252 (Stevens, J., dissenting) (explaining determination that Corps's properly entertained jurisdiction over wetlands).

107. *See id.* at 2255 (Stevens, J., dissenting) (explaining that Court's decision in *Riverside Bayview* controls current dispute).

108. *See id.* (Stevens, J., dissenting) (emphasis in original) (quoting *United States v. Riverside Bayview Homes*, 474 U.S. 121, 123 (1985)) (discussing issue of case).

109. *See Rapanos*, 126 S. Ct. at 2255-56 (Stevens, J., dissenting) (determining *Riverside Bayview* to hold that Corps has discretion to determine when wetland may be deemed to have significant effect on adjacent waterways).

that filling such wetlands would pose no significant detrimental effects on adjacent waterways.[110]

Justice Stevens also disagreed with Justice Scalia's interpretation of the effect of the Court's holding in *SWANCC*.[111] According to Justice Stevens, the *SWANCC* decision was of little relevance to the matter before the Court because "*SWANCC* had nothing to say about wetlands, let alone about wetlands adjacent to traditionally navigable waters or their tributaries."[112] Rather, the *SWANCC* decision was concerned only with "nonnavigable, isolated, intrastate waters" and therefore was distinct from the matter at hand.[113]

Finally, Justice Stevens disagreed with Justice Scalia's view that granting an expansive view of what may be deemed protected under the CWA imposed impermissible economic burdens on the economy.[114] Justice Stevens argued that such considerations exceeded the power of the judiciary and that it was not the court's duty to make determinations as to whether "particular conservation measures outweigh their costs."[115] Instead, Justice Stevens found that such determinations should be addressed solely by the elected officials in Congress.[116] In this case, Justice Stevens found that relevant congressional history supported a finding that Congress intended the CWA to grant the Corps broad jurisdiction, and only when Congress decides to curtail such jurisdiction may the Corps's jurisdiction be limited.[117]

V. CRITICAL ANALYSIS

By remanding the decision of the Sixth Circuit, the plurality called into question federal regulations that had, until this decision,

110. *See id.* at 2258 (Stevens, J., dissenting) (emphasis added) (finding Corps's jurisdiction over wetlands reasonable).

111. *See id.* at 2256 (Stevens, J., dissenting) (finding Justice Scalia's opinion to misinterpret Court's holding in *SWANCC*).

112. *See id.* (Stevens, J., dissenting) (determining *SWANCC* decision to be off point in present dispute).

113. *See id.* (Stevens, J., dissenting) (determining *SWANCC* decision to be off point in present dispute).

114. *See Rapanos*, 126 S. Ct. at 2259 (Stevens, J., dissenting) (discussing economic burden imposed by broad interpretation of CWA).

115. *See id.* (Stevens, J., dissenting) (discussing limitations of judiciary's authority).

116. *See id.* (Stevens, J., dissenting) (finding scope of judicial authority did not extend to limiting Corps's jurisdiction).

117. *See id.* at 2265 (Stevens, J., dissenting) (finding judiciary did not have authority to limit jurisdiction of Corps).

withstood over thirty years of judicial and legislative scrutiny.[118] Both the opinions of Justice Scalia and Justice Kennedy failed to properly consider the effect of Supreme Court precedent when arriving at their conclusions.[119] Additionally, Justice Scalia's opinion failed to pay adequate deference to Congress's policy considerations underlying its passage of the CWA and therefore unjustifiably encroaches upon the powers of Congress.[120]

A. Failure to Properly Adhere to Precedent

Neither the opinion of Justice Scalia nor that of Justice Kennedy provides an adequate basis to distinguish the Court's holding in *Riverside Bayview* from the issue raised by the petitioners.[121] As Justice Stevens correctly asserted, the Court's decision in *Riverside Bayview* appears to squarely address the issue before the Court by holding that the Corps's jurisdiction extended to both waters lying adjacent to navigable bodies of water and their tributaries.[122] The Court in *Riverside Bayview* arrived at this conclusion by looking to the express intent of Congress to restore the integrity of the nation's waters.[123]

Congress, cognizant of the difficulties inherent in accomplishing its goal due to the complex nature of water pollution, adopted a broad definition of the term "waters" rather than attempting to employ a bright line definition.[124] The Court determined that wetlands lying adjacent to waters of the United States were properly covered by the CWA and within the Corps's jurisdiction based on a showing by the Corps that such waters "as a general matter play a

118. *See* Savage, *supra* note 14, at M3 (discussing implications of *Rapanos* decision).

119. For a discussion of Justice Scalia's opinion's failure to adequately consider Supreme Court precedent, see *infra* notes 127-40 and accompanying text. For a discussion of Justice Kennedy's opinion's failure to adequately consider Supreme Court precedent, see *infra* notes 141-50 and accompanying text.

120. For a further discussion of Justice Scalia's plurality opinion's failure to pay adequate deference to Congress, see *infra* notes 151-64 and accompanying text.

121. *See Rapanos*, 126 S. Ct. at 2255 (Stevens, J., dissenting) (determining issue in *Rapanos* dispute to fit squarely within Court's decision in *Riverside Bayview*).

122. *See id.* (Stevens, J., dissenting) (determining issue in *Rapanos* to fit squarely within Court's decision in *Riverside Bayview*).

123. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 132 (1985) (discussing congressional purpose of CWA).

124. *See id.* at 132-33 (discussing congressional intent in broadly defining term "waters" under CWA). The Corps acknowledged the difficulty in adequately determining which waters required protection under the CWA, saying "[t]he regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system." *Id.*

key role in protecting and enhancing water quality."[125] To the *Riverside Bayview* Court then, the decisive factor in rendering its judgment was Congress's intent to grant the Corps broad federal regulatory authority and its deference to the Corps's ecological judgment in determining which waters may impact the quality of the nation's waters.[126]

1. *Justice Scalia's Opinion*

Justice Scalia attempted to sidestep the binding effect of *Riverside Bayview* on the dispute before the Court by employing a narrow interpretation of the case's holding and attempting to limit that holding to the specific facts presented in that case.[127] Justice Scalia specifically cited to the *Riverside Bayview* Court's observation that "the Corps must necessarily choose some point at which water ends and land begins" as support for the assertion that the *Riverside Bayview* decision held only that the Corps possessed jurisdiction to regulate "wetlands that 'actually abutted' traditional navigable waters."[128] Scalia's choice of citations from the *Riverside Bayview* decision was misleading, however, and could hardly be said to do justice to the Court's actual determinations in that case.[129] Indeed, one need look only to the language directly following this quotation to understand that the scope of the Court's decision in that case was in fact much broader than Justice Scalia would have the reader believe.[130] Although the Court acknowledged that the Corps had a duty to determine when and where "waters" protected under the CWA began, they also recognized that doing so is "no easy task" and that when considering semi-aquatic areas typically considered wetlands, the determination of where these waters begins is "far from obvious."[131]

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125. *See id.* at 133 (discussing Corps's jurisdiction over waters lying adjacent to waters of the United States).

126. *See id.* (discussing Court's reasoning in interpreting CWA to extend to wetlands lying adjacent to waters of United States).

127. *See Rapanos*, 126 S. Ct. at 2216 (discussing Court's holding in *Riverside Bayview*).

128. *See id.* (discussing Court's holding in *Riverside Bayview*).

129. For a further discussion of Justice Scalia's misleading reference to *Riverside Bayview*, see *infra* notes 130-35 and accompanying text.

130. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 132 (1985) (discussing Corps's jurisdiction under CWA).

131. *See id.* (discussing difficulty in discerning boundaries between wetlands and waters).

Justice Scalia's proposed "wetlands test" flies in the face of the Court's reasoning in *Riverside Bayview.*[132] The test Justice Scalia created to determine whether a landmass is covered by the CWA transforms what the *Riverside Bayview* Court viewed as a difficult task into a simple determination.[133] According to Scalia, one need only determine whether a continuous surface connection exists between a wetland and an adjacent water of the United States to decide whether that wetland is covered under the CWA.[134] The considerations employed under this test can hardly be said to be overly complex; rather, the test appears to evaluate only "obvious" factors, and as such, the test cannot be said to consider the same criteria envisioned by the *Riverside Bayview* Court.[135]

Scalia attempted to offset his cursory treatment of the *Riverside Bayview* decision by over-exaggerating the Court's subsequent decision in *SWANCC.*[136] Scalia interpreted the Court's decision in *SWANCC* as standing for the proposition that the Court may impose limitations on the Corps's ability to define the "waters of the United States" for purposes of the CWA, and that such authority extends to the waters in dispute before the Court.[137] Scalia's interpretation of this precedent was erroneous however, as the Court's decision in *SWANCC* addressed the application of the CWA's protection over isolated wetlands for the purpose of protecting migratory birds.[138] Accordingly, *SWANCC* does not address the petitioners' argument.[139] Unlike *Riverside Bayview,* the Court in *SWANCC* did not consider whether Congress intended the CWA to apply to waters lying adjacent to "navigable waters," and because this was the question at the heart of the petitioner's dispute, Scalia's emphasis on the *SWANCC* decision was inappropriate.[140]

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132. For a further discussion of Justice Scalia's misleading reference to *Riverside Bayview,* see *supra* notes 129-31, *infra* notes 133-35 and accompanying text.

133. For a discussion of Justice Scalia's attempts to over-simplify the considerations of the *Riverside Bayview* Court, see *infra* notes 134-35 and accompanying text.

134. *See Rapanos,* 126 S. Ct. at 2226-27 (discussing breadth of protection offered to wetlands under CWA).

135. *See Riverside Bayview,* 474 U.S. at 132-33 (discussing complex nature of determining which wetlands are covered under CWA).

136. For a further discussion of Scalia's over-emphasis on *SWANCC,* see *infra* notes 137-39 and accompanying text.

137. *See Rapanos,* 126 S. Ct. at 2217 (discussing Court's holding in *SWANCC*).

138. *See SWANCC v. U.S. Army Corps of Engineers,* 531 U.S. 159, 171-72 (2001) (refusing to apply Court's holding in *Riverside Bayview* to isolated ponds because they serve as habitat for migratory birds).

139. For a discussion of Justice Scalia's erroneous application of the *SWANCC* opinion to the dispute in *Rapanos,* see *supra* notes 136-38, *infra* note 140 and accompanying text.

140. *See SWANCC,* 531 U.S. at 162 (discussing issue before Court).

2. Justice Kennedy's Concurrence

Justice Kennedy's concurrence similarly failed to give the Court's decision in *Riverside Bayview* adequate deference, albeit less egregiously than Justice Scalia's opinion.[141] Although expressly denouncing the severe limitations that Justice Scalia proposed, [142] Justice Kennedy would impose limits on the Corps's authority that are unsupported by the Supreme Court jurisprudence.[143] Justice Kennedy's argument for the imposition of limits on the Corps's authority fails to homogenize his position with the Court's broad holding in *Riverside Bayview* and the Court's apparent satisfaction in that case concerning the Corps's authority to determine when it is appropriate to grant permits to wetlands lying adjacent to national waterways.[144]

Furthermore, Justice Kennedy's proposed significant nexus test found its only source of authority in the *SWANCC* case rather than *Riverside Bayview*, which was more on point in the *Rapanos* dispute.[145] Again, the *SWANCC* decision dealt with the Corps's authority to impose restrictions on inland ponds,[146] where *Riverside Bayview* specifically addressed the Corps's authority over wetlands lying adjacent to navigable waters.[147] Justice Kennedy's concurrence relied too heavily on the *SWANCC* Court's passing reference to a "significant nexus" when he should have instead formed his opinion based on the Court's holding in *Riverside Bayview.*[148] *Riverside Bayview* determined that the application of CWA protection to

141. For a discussion of Justice Kennedy's failure to adhere to precedent, see *supra* notes 121-26 and accompanying text; see also *infra* notes 142-43 and accompanying text.

142. *See Rapanos* 126 S. Ct. at 2242 (Kennedy, J., concurring) (discussing test imposed by Justice Scalia). Justice Kennedy found Justice Scalia's test to be "without support in the language and purposes of the [CWA] or in our cases interpreting it." *Id.*

143. *See id.* at 2249 (requiring Corps to show significant nexus when enforcing CWA).

144. For a further discussion of Justice Kennedy's failure to adhere to precedent, see *supra* notes 141-50 and accompanying text.

145. *See Rapanos*, 126 S. Ct. at 2249 (Kennedy, J. concurring) (requiring Corps to show significant nexus when enforcing CWA). *See also SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159, 185 (2001) (Stevens, J., dissenting) (discussing considerations of *Riverside Bayview* Court); *Rapanos*, 126 S. Ct. at 2264 (Stevens, J., dissenting) (questioning Justice Kennedy's reliance on significant nexus test).

146. *See SWANCC*, 531 U.S. at 162 (discussing issue before Court).

147. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 123 (1985) (discussing issue before Court).

148. *See Rapanos*, S. Ct. 126 at 2256 (Stevens, J., dissenting) (distinguishing *SWANCC* from *Riverside Bayview*). Justice Stevens explained that "*SWANCC* had nothing to say about wetlands, let alone about wetlands adjacent to traditionally navigable water or their tributaries." *Id.*

waters adjacent to navigable waters is proper when the Corps's ecological judgment deems it to be so.[149] Therefore, Justice Kennedy's reliance on what may properly be described as dicta in the *SWANCC* opinion caused Justice Kennedy to arrive at a conclusion that is contrary to the precedent set forth in *Riverside Bayview*.[150]

B. Critique of Justice Scalia's Policy Analysis

Justice Scalia's opinion acts to undermine Congress's policy considerations in enacting the CWA.[151] The Corps's authority to impose its own reasonable interpretation of the term "waters" when enforcing the CWA is sourced in a power backed by Congress.[152] As the Court stated in *Chevron*, where "Congress has explicitly left a gap for [a governmental] agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[153] An agency's elucidation of such a provision will be considered enforceable where it is "based on a permissible construction of the statute."[154] As stated above, the Court concluded in *Riverside Bayview* that Congress's decision not to set forth a precise definition of the term "waters" under the CWA was a reflection of its desire to create a broad definition of that term, thereby abrogating any limitations that might result from its attempts to craft a definition of the term.[155] Moreover, not only did the *Riverside Bayview* Court determine that Congress intended to leave this "gap" in the legislation, but the Court also concluded that the Corps's practice of applying the definition to wetlands lying adjacent to "navigable waters" constituted a permissible construction of the term under the CWA.[156]

Justice Scalia's attempt to circumvent the legislative power by passing the Corps's treatment of the CWA off as "impermissible" is

149. *See Riverside Bayview*, 474 U.S. at 132-33 (discussing Corps's proper application of CWA).

150. For a discussion of Justice Kennedy's formulation of the "significant nexus" test, see *supra* note 145-49 and accompanying text.

151. For a discussion of Justice Scalia's opinion's failure to properly assess environmental concerns, see *infra* notes 160-64 and accompanying text.

152. *See Riverside Bayview*, 474 U.S. at 132-33 (discussing congressional intent to grant broad authority to Corps).

153. *See Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (describing authority of governmental agencies).

154. *See id.* at 843 (discussing agency's ability to interpret statutes).

155. *See Riverside Bayview*, 474 U.S. at 132 (explaining Congress's intent to define "waters" broadly under CWA).

156. *See id.* at 133 (determining Corps's interpretation of CWA to be permissible).

wrought with erroneous assertions.[157] In proposing the imposition of significant limitations on the Corps, Justice Scalia faced a significant challenge — limiting the Corps's authority while simultaneously refraining from frustrating the intent of Congress in passing the CWA.[158] In attempting to overcome this hurdle, Justice Scalia presented examples of instances where district courts have given liberal treatment to the CWA and concluded on that basis that the CWA will still act to effectively limit pollution of the nation's waters.[159] Members of the environmental community, however, do not support Justice Scalia's determinations of the environmental effect of his limitations.[160] Rather, some have argued that Justice Scalia's opinion "shows no awareness of what hydrologic investigations have demonstrated about the interconnectedness of ground and surface waters."[161] Indeed, field data supports the finding that "groundwater moves [and] that it regularly feeds surface streams or lakes, often keeping these waters flowing between rainstorms."[162] In light of such findings, Justice Scalia's proposed test would significantly impede the effectiveness of the CWA in restoring the "integrity" of the nation's waters because the Corps would be unable to regulate factors that are critical in protecting the nation's waters.[163] Therefore, Justice Scalia's attempt to impose limitations on the Corps without frustrating the policy considerations of Congress fails entirely.[164]

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157. *See Rapanos v. United States*, 126 S. Ct. 2208, 2224 (2006) (discussing permissibility of Corps's construction of "waters" under CWA).

158. For a discussion of an agency's ability to interpret gaps left in laws passed by Congress, see *supra* notes 151-54 and accompanying text.

159. *See Rapanos*, 126 S. Ct. at 2227-28 (discussing lower courts' treatment of CWA).

160. *See* Donald Kennedy & Brooks Hanson, *What's a Wetland, Anyhow?*, SCI., Aug. 25, 2006, at 1019 (discussing environmental considerations of Justice Scalia).

161. *See id.* (discussing Scalia's lack of comprehension of ecological considerations).

162. *See id.* (demonstrating Scalia's lack of awareness of findings of hydrologic investigations).

163. *See generally id.* (discussing Justice Scalia's failure to grasp important environmental concepts in opinion).

164. For a discussion of Justice Scalia's policy analysis, see *supra* notes 151-64 and accompanying text.

VI. IMPACT

A. Justice Scalia's Opinion

Justice Scalia's opinion does not currently possess any significant weight of authority because it is not a majority opinion.[165] If a majority of the Court had adopted the opinion, however, it could have proved disastrous for the nation's environment.[166] Justice Scalia's "continuous adjacent surface connection" test would significantly limit the federal government's power to impose CWA restrictions throughout the nation, thereby hindering the government's ability to deter future pollution of a significant portion of the nation's waterways.[167]

The test's effects would be widespread — "most streams" and wetlands in the nation's interior would lose CWA protection,[168] and seasonal western waterways that account for millions of "stream miles" would have their CWA protection revoked because they flow only intermittently.[169] Removing these streams from CWA protection would have significant consequences: "[t]he net effect is that seasonal streams and wetlands could disappear, further stressing perennial rivers with more pollution by removing the capillary water systems that feed them. With the loss of these capillaries, the

165. *See Rapanos*, 126 S. Ct. 2208, 2236 (2006) (Roberts, C.J., concurring) (explaining that because no opinion commanded majority, proper interpretation of Corps's jurisdiction was uncertain).

166. *See Morning Edition: High Court Splits on Clean Water Act Case* (NPR radio broadcast June 20, 2006) (discussing possibility of Justice Scalia's opinion commanding majority of Court). In response to the *Rapanos* decision, Jim Murphy of the National Wildlife Federation stated: "If Justice Scalia's view had prevailed, we'd really be talking about a complete disaster." *Id.*

167. For a discussion of the potential effect Justice Scalia's proposed test would have on our nation's waters, see *infra* notes 168-72 and accompanying text.

168. *See* Savage, *supra* note 14, at M3 (discussing potential impact of Justice Scalia's opinion if adopted by majority).

169. *See* Tebbutt, *supra* note 13, at F1 (discussing potential impact of Justice Scalia's test if implemented in environmental enforcement). *See also,* Sandra Zellmer, *Supreme Court Drops the Ball On Issue of Wetlands Protection*, LINCOLN J. STAR, July 10, 2006, at B4 (discussing potential effect of Justice Scalia's opinion). Zellmer argued:

> If Scalia had convinced Justice Kennedy to join in his opinion, many - in fact, most - wetlands and streams would be excluded from federal protection. Many of the remaining wetlands are not adjacent to navigable waters, and the National Hydrology Dataset shows that nearly 60 percent of the total stream miles in the United States are nonperennial. In Western states like New Mexico, Colorado and Nebraska, the figure is much higher: 80 to 90 percent of their streams flow only in wet weather.

Id.

main arteries also would clog, weaken and even dry up."[170] The serious detrimental effects of Justice Scalia's new formulation would not be limited to rural areas; rather, they could also lead to disastrous consequences in urban areas as well.[171] For example, smaller wetlands in New York State that do not possess the requisite continuous surface connection under Justice Scalia's test provide critical water sources to New York City.[172]

B. Justice Kennedy's Concurrence

The concurrence offered by Justice Kennedy is, arguably,[173] the authority to be followed by lower courts when determining whether a body of water constitutes a wetland for purposes of the CWA.[174] Although the opinion does not pose significant threats to the future of the nation's waters as that of Justice Scalia,[175] the opinion nevertheless will undoubtedly be the source of confusion and uncertainty for lower courts and members of the Corps.[176] Fur-

170. *See* Tebbutt, *supra* note 13, at F1 (discussing effect of removing rivers and streams from protection under CWA).

171. For a discussion of the potential effect Justice Scalia's proposed test could have on urban areas, see *supra* notes 165-70, *infra* note 172 and accompanying text.

172. *See Interpreting the Effect of the U.S. Supreme Court's Recent Decision in the Joint Cases of* Rapanos v. United States *and* Carabell v. U.S. Army Corps of Engineers *on "The Waters of the United States:" Hearing Before the Senate Committee on Environment and Public Works Subcommittee on Fisheries, Wildlife and Water*, 109th Cong. (2006), *available at* http:epw.senate.gov/hearing-statements.cfm?id=260397 (statement of Senator Hilary Rodham Clinton (D-NY)) (explaining potential effect of Justice Scalia's opinion on New York City).

173. *See States Fear Increased Wetlands Workload in Wake of Rapanos Ruling*, ENVTL. POL'Y ALERT, Sept. 27, 2006 (discussing government's understanding of plurality opinion). "The Justice Department (DOJ) has been instructing lower courts since the ruling to apply either the Scalia or Kennedy tests, as appropriate." *Id. But see Rapanos v. United States*, 126 S. Ct. 2208, 2265 (2006) (Stevens, J., dissenting) (stating that lower courts should reinstate judgments in *Rapanos* and *Carabell* if either Justice Scalia's or Justice Kennedy's tests were satisfied).

174. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that where plurality forwards no single rationale for holding, holding is that of the narrowest scope).

175. *See Interpreting the Effect of the U.S. Supreme Court's Recent Decision in the Joint Cases of* Rapanos v. United States *and* Carabell v. U.S. Army Corps of Engineers *on "The Waters of the United States:" Hearing before the Senate Environment and Public Works Subcomittee on Fisheries, Wildlife and Water*, 109th Cong. (2006) (Statement of William W. Buzbee, Professor, Emory Law School), *available at* http://epw.senate.gov/109th/Buzbee_Testimony.pdf (explaining impact of Justice Kennedy's concurrence on environment). Buzbee explained that "Justice Kennedy's 'significant nexus' articulation ends up creating an overwhelming overlap with long-established regulatory approaches, as well as with the approaches articulated in the Justice Stevens Rapanos [sic] dissent for four other justices." *Id.*

176. *See* George J. Mannina, *"Waters of the U.S.:" Definition Remains in Doubt After Supreme Court Ruling*, WASH. LEGAL FOUND., Aug. 18, 2006, *available at*

thermore, due to the requirements of Justice Kennedy's significant nexus test, the opinion will impose widespread financial burdens that were nonexistent prior to the *Rapanos* decision.[177]

Confusion in the lower courts following the Supreme Court's decision in *Rapanos* is already apparent.[178] The Northern District of Texas concluded that the "'significant nexus' test came with no guidance," and instead, the court consulted Fifth Circuit case law in determining what constituted a significant nexus.[179] The Middle District of Florida rendered a decision upholding the application of the CWA on the basis that the facts of the case would hold up under either Justice Scalia or Justice Kennedy's proposed tests.[180]

Adhering to Justice Kennedy's significant nexus test places tremendous burdens on the EPA's administration of wetland enforcement.[181] The decision will impede the Corps's ability to regulate because it will require the agency to take extra steps when deciding

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www.wlf.org/upload/081816mannina.pdf (explaining state of law post-*Rapanos*). Mannina explained:

> So, when is a stream, river or lake 'relatively permanent?' For the plurality, a relatively permanent water body is one where there is a water flow or presence for more than one month since the plurality uses the plural 'some months.' But that area may also be dry for 'some months.' Where to drawn [sic] the line is not very clear. The guidance offered by the plurality is that '[c]ommon sense and common usage distinguish between a wash and a seasonal river.' However, the plurality declined 'to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel as a 'water of the United States.'

Id. at 2.

177. *See* Lucy Kafanov, *Senators, Experts Butt Heads Over Supreme Court's CWA Ruling*, ENV'T AND ENERGY DAILY, Aug. 2, 2006 (explaining financial consequence of *Rapanos* decision). Kafanov asserted that

> [B]ased on the testimony of lawmakers, Bush administration officials, legal experts and other interested parties, potential remedies have multiplied as fast as interpretations of the decision. The one fact agreed on by all is that a failure to swiftly act to clarify the scope and meaning of the Rapanos decision will result in a costly quagmire of litigation.

Id.

178. *See* Kevin Holewinski & Ryan D. Dahl, *Rapanos: Putting the Government to Its Proof Under the Clean Water Act*, MONDAQ BUS. BRIEFING, Aug. 21, 2006, *available at* www.jonesday.com/pubs/pubs_detail.aspx?pubID=S3627 (describing decisions by lower courts following *Rapanos* decision).

179. *See id.* (discussing decision by Northern District of Texas regarding significant nexus test).

180. *See id.* (discussing decision by Middle District of Florida upholding application of CWA under both Justice Scalia and Justice Kennedy's tests).

181. *See* Michael S. Giannotto, Gregory A. Bibler & Kevin P. Pechulis, *Supreme Court Requires "Significant Nexus" to Navigable Waters for Jurisdiction under Clean Water Act Section 404*, ENVTL. AND ENERGY ADVISORY, July 5, 2006, at 5, *available at* www.goodwinprotcor.com (follow "publications" hyperlink, then follow "view all publications" hyperlink) (discussing impact significant nexus test will have on Corps).

whether to issue CWA permits to developers.[182] To satisfy the significant nexus test, the Corps will most often be required to make scientific findings to establish the existence of such a nexus each time it decides whether to grant or deny a developer a permit to fill wetlands.[183] The process will result in increased uncertainty, both with respect to the EPA in its efforts to adequately assess the merits of each section 404 permit as well as for those seeking such permits.[184]

C. The Fate of the Environment in the Hands of the Roberts Court

As the first major environmental issue addressed by the Roberts Court, the *Rapanos* decision offers noteworthy insight into the treatment that environmental issues will likely receive from the Court.[185] The case reveals a clear divide between the Scalia "bloc" and the Justice Stevens dissenters, and given the great disparity between the views expressed by these two contingents, it is unlikely that a middle ground will ever be forged between them.[186] Consequently, given the current makeup of the Court, Justice Kennedy will likely play a key role in the direction the Court takes with environmental cases in the near future.[187]

The alignment of Justices Roberts and Alito with the views expressed by Justice Scalia is a cause for deep concern to some.[188] Justice Scalia's opinion, which possessed a striking antagonism to-

182. *See id.* (explaining impact of Rapanos on Corps's authority). "If the Corps were to follow Justice Kennedy's concurrence, which seems likely, it henceforth must establish a 'significant nexus' on a case-by-case basis between wetlands and a navigable water before it asserts jurisdiction. . . ." *Id.*

183. *See id.* (explaining difficulty of implementing significant nexus test).

184. *See Interpreting the Effect of the U.S. Supreme Court's Recent Decision in the Joint Cases of* Rapanos v. United States *and* Carabell v. U.S. Army Corps of Engineers *on "The Waters of the United States:"* Testimony before the Committee on Environmental and Public Works Subcomittee on Fisheries, Wildlife and Water, 109th Cong. 6 (2006) (Statement of Jonathan H. Adler, Professor of Law and Co-Director, Western Reserve University School of Law), *available at* http://epw.senate.gov/109th/Adler_Testimony.pdf (discussing potential effect of Justice Kennedy's significant nexus test).

185. *See On Divided Court, Kennedy Emerges as Key in Future Environment Suits,* DEF. ENV'T ALERT, June 27, 2006, (discussing future of Supreme Court).

186. *See id.* (explaining differences in views expressed in opinions of Justices Scalia and Stevens).

187. *See id.* (discussing Justice Kennedy's potential influence on environmental concerns in Court's near future).

188. *See High Court's Divisions May Limit Legal Certainty In Environmental Suits,* RISK POL'Y REP., June 27, 2006 (explaining concern expressed regarding Justices Alito and Roberts alignment with Scalia bloc). "[I]t's a bad sign [for the environment] that Roberts and Alito joined Scalia and Thomas." *Id.*

ward the environment,[189] would have simultaneously dismantled environmental legislation that had stood for over thirty years while displaying a "radical rejection of the twenty-year-old *Riverside Bayview* Court precedent."[190] Justices Roberts and Alito's apparent acquiescence to the views of Justice Scalia signals dangerous times ahead — this time the dismantling of the CWA was only a "close-call," but should the makeup of the Court shift any further toward the position of Justice Scalia in the future, the nation may not be so lucky.[191]

Bill Currie

189. *See id.* (discussing opinion of Justice Scalia).

190. *See* Statement of Buzbee, *supra* note 175, at 4 (explaining effects of Kennedy's concurrence on America's waters).

191. *See* Statement of Clinton, *supra* note 172 (describing decision in Rapanos as "close call").